STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED April 27, 2006
v	No. 258575 Oakland Circuit Court
JAN-JAMES BUCHANAN, Defendant-Appellant.	LC Nos. 2004-196178-FH 2004-196899-FH

Before: Markey, P.J., and Schuette and Borrello, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of criminal sexual conduct in the third degree (CSC III), MCL 750.520d(1)(b), domestic violence, third offense, MCL 750.81(4), and aggravated stalking, MCL 750.411i(2). He was sentenced to concurrent prison terms of 10 to 15 years for the CSC III conviction, 1 to 2 years for the domestic violence conviction, and 1 year, 6 months to 5 years for the aggravated stalking conviction. Defendant appeals as of right. We affirm.

I. FACTS

On the evening of April 29, 2004, defendant sexually assaulted his wife, Candace Buchanan (Ms. Buchanan). Ms. Buchanan testified that the following occurred. Defendant went to bed earlier that evening. Ms. Buchanan thereafter joined defendant in bed. Within five minutes of her having arrived therein, defendant threw her on her stomach, placed his hands on her vagina, and then forcefully drove his fingers in and out of her vagina. Ms. Buchanan asked defendant to stop. Defendant did not do so and instead began pulling Ms. Buchanan's hair and smacking her on her rear end. In response to Ms. Buchanan's screaming, defendant closed the bedroom window. Ms. Buchanan began getting sick to her stomach, eventually making it to the bathroom to vomit.

The following day, defendant went to work and Ms. Buchanan got her child to school. She did not immediately contact the police. Upon defendant's return, he told Ms. Buchanan: "you can sleep alone tonight." Fearing that defendant would again act as he had, Ms. Buchanan thereafter contacted the police, filed a report, and had pictures taken of her buttock injuries. While she was at the police department, defendant arrived, indicating that he desired to file a police report against Ms. Buchanan for physical and verbal abuse. Officer Marc Williams

interviewed both defendant and Ms. Buchanan. Based on these interviews, his observations of Ms. Buchanan's injuries and defendant's lack thereof, he arrested defendant.

On May 3, 2004, Ms. Buchanan obtained a personal protection order against defendant, prohibiting him from contacting her. She testified that from jail, defendant thereafter contacted Ms. Buchanan by telephone. On June 2, she filed a police report detailing the incidents. Ms. Buchanan indicated that the subsequent contacts caused her to feel "scared" and "petrified," for both herself and her children.

Prior to trial, evidentiary motions were made by the prosecutor and defendant, respectively seeking admission of defendant's history of domestic violence and admission of Ms. Buchanan's past sexual conduct. Defendant argued that such evidence was probative of an alleged sexual encounter, occurring two nights prior to the instant assault, from which resulted the injuries on Ms. Buchanan's buttocks. In ruling on defendant's motion, the circuit court determined that the proffered evidence was not admissible, in view of its highly prejudicial nature and its nonexistent probative value." The circuit court however, granted the prosecutor's motion to admit other acts evidence of domestic violence by defendant.

During trial, evidence was produced indicating defendant's history of domestic violence via the testimony of Ms. Buchanan, Officer Janeen Gielniak, and defendant's former spouse Wendy Buchanan. Defendant claims the trial court erroneously admitted this evidence of his history of domestic violence, improperly excluded evidence of the plaintiff's past sexual predictions, convicted him of stalking on the basis of insufficient evidence, and improperly calculated his sentence with respect to the statutory sentencing guidelines.

II. RAPE SHIELD STATUTE

Defendant claims that the circuit court improperly excluded evidence of the complainant's past sexual predilections, arguing that admission of the same was central to his defense of the CSC III charge. We disagree.

A. Standard of Review

We review a trial court's decision whether to admit evidence for an abuse of discretion. *People v McDaniel*, 469 Mich 409, 412; 670 NW2d 659 (2003). Likewise, a court's restriction of cross-examination is reviewed for an abuse of discretion. *People v Adair*, 452 Mich 473, 485, 488-489; 550 NW2d 505 (1996).

B. Analysis

Michigan's rape shield statute provides in relevant part that

> [e]vidence of specific instances of the victim's sexual conduct, opinion evidence of the victim's sexual conduct, and reputation evidence of the victim's sexual conduct shall not be admitted . . . unless and only to the extent that the judge finds that the following proposed evidence is material to a fact at issue in the case and that its inflammatory or prejudicial nature does not outweigh its probative value:

(a) Evidence of the victim's past sexual conduct with the actor. [MCL 750.520j(1).]

The rape shield law operates as a general evidentiary exclusionary rule, establishing that evidence of an alleged assault victim's past sexual practices is largely irrelevant to whether a charged assault occurred. *People v Morse*, 231 Mich App 424, 432; 586 NW2d 555 (1998). "[W]hen the proposed evidence relates to the [victim's] consensual sexual relations *with the defendant*, the public policy interests in excluding prejudicial, inflammatory, or misleading bad act character evidence are no longer the primary focus of the statute. Instead, the focus shifts to materiality and balancing probative value against prejudice." *Adair, supra* at 481-482. This balancing requires case-by-case evaluation, depending on the facts of the case. *Id.* at 483, 485.

Given this type of evaluation, defendant has failed to establish that the circuit court abused its discretion. Defendant and the victim are husband and wife. He maintains that the victim's injuries were the result of consensual sexual activity occurring two nights prior to the alleged sexual abuse. In order to establish this, he sought to present evidence, and cross-examine the victim concerning, the couple's history of sexual behavior—namely their propensity to engage in "rough" consensual sex. However, evidence regarding, and cross-examination of the victim concerning, her alleged sexual predilections would not demonstrate that she consented to the assault. *People v McLaughlin*, 258 Mich App 635, 655; 672 NW2d 860 (2003) (noting that the "salacious detail" of the parties' prior sexual relations had "only the most tenuous connection to the question of the victim's consent . . . but great potential for embarrassment, harassment, and unnecessary intrusion into privacy"). The circuit court was thus justified in concluding that the proffered evidence was of scant probative value.

Conversely, defendant was not prejudiced by the exclusion. He was permitted to present a main defense—that the injuries to the complainant were indeed the result of consensual sexual activity two evenings prior—thereby indicating that the alleged assault did not occur. Defendant testified to this effect; his testimony was corroborated by prior consistent statements made to the police; and a statement he authored for the police, specifically detailing his version of the events, the source of the complainant's injuries, and the parties' prior sexual relations, was admitted into evidence. In fact, and despite the court's evidentiary ruling, defendant was permitted to cross-examine the complainant as to the parties' sexual conduct two nights prior, which she denied, and as to her general desire for rough sexual conduct, which she further denied.

Defendant argues that his constitutional right to confrontation, embodied in his right to cross-examine prosecution witnesses, was prejudiced by the court's preclusion of questions concerning the parties' past sexual conduct. However, "'[t]he right to confront and cross-examine is not without limits. It does not include a right to cross-examine on irrelevant issues. It may bow to accommodate other legitimate interests in the criminal trial process and other social interests.'" *People v Hackett*, 421 Mich 338, 344; 365 NW2d 120 (1984), quoting *People v Arenda*, 416 Mich 1, 8; 330 NW2d 814 (1982). As evidence of the parties' past sexual relations was of scant probative value, defendant had no right to cross-examine the complainant concerning the same; it was irrelevant.

Defendant has therefore failed to establish that the circuit court abused its discretion with respect to its limitations on the admission of evidence concerning, on cross-examination of the complainant regarding, alleged aspects of her general sexual history.

III. MRE 404(b) EVIDENCE

Defendant next claims that the circuit court erroneously admitted evidence of his history of domestic violence, namely testimony of both his current and former spouses relaying specific instances of physical and sexual abuse. We disagree.

A. Standard of Review

Again, we review such evidentiary determinations for an abuse of discretion. *People v Crawford*, 458 Mich 376, 383; 582 NW2d 785 (1998).

B. Analysis

MRE 404(b)(1) provides:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident when the same is material, whether such other crimes, wrongs, or acts are contemporaneous with, or prior or subsequent to the conduct at issue in the case.

Admission of evidence under this rule must meet the following threshold: it must be proffered for a proper purpose, not merely to show conduct in conformity therewith; it must be relevant to an issue of fact of consequence; the danger of unfair prejudice must not substantially outweigh the probative value of the evidence; and a limiting instruction may be provided if requested. *People v Sabin (After Remand)*, 463 Mich 43, 55-56; 614 NW2d 888 (2000). Evidence is probative if it has a "tendency to make the existence of any fact that is of consequence . . . more probable or less probable than it would be without the evidence." *People v Brooks*, 453 Mich 511, 518; 557 NW2d 106 (1996), quoting *People v Mills*, 450 Mich 61, 68; 537 NW2d 909 (1995).

Defendant's argument on appeal centers on the above third factor—that the offered evidence was substantially more prejudicial than probative. Again, however, defendant has failed to establish that the circuit court abused its discretion. As the testimony of defendant's former spouse evinced a common scheme and plan of defendant's reporting abuse allegedly directed at him after he actually committed domestic abuse, it was proffered to rebut his claim that the complainant fabricated the instant abuse. See *People v Starr*, 457 Mich 490, 501-503; 577 NW2d 673 (1998) (finding similar evidence probative in rebutting a claim of fabrication). The victim's testimony evidencing defendant's domestic violence was probative of her state of mind. For purposes of an aggravated stalking charge, a prosecutor must prove that the victim "felt terrorized, frightened, intimidated, threatened, harassed, or molested." MCL 750.411i(1)(e). Defendant's history of such violence lent credence to her testimony that defendant's conduct caused her to feel accordingly. Further, as "the danger [MRE 404(b)] seeks to avoid is that of unfair prejudice, not prejudice that stems only from the abhorrent nature of the crime itself," *Starr, supra* at 499-500, defendant cannot establish that the prejudice he may have suffered was substantially greater than what he otherwise would have suffered, given the

similarity of the underlying allegations. Accordingly, the circuit court did not abuse its discretion.

IV. SUFFICIENCY OF THE EVIDENCE

Next, defendant claims that there was insufficient evidence upon which to convict him of aggravated stalking. We disagree.

A. Standard of Review

In reviewing challenges to the sufficiency of the evidence, we consider "whether the evidence, viewed in a light most favorable to the people, would warrant a reasonable juror in finding guilt beyond a reasonable doubt. The standard . . . is deferential: [a reviewing court is] required to draw all reasonable inferences and make credibility choices in support of the jury verdict." *People v Gonzalez*, 468 Mich 636, 640-641; 664 NW2d 159 (2003).

B. Analysis

MCL 750.411i(1)(e) provides:

> "Stalking" means a willful course of conduct involving repeated or continuing harassment of another individual that would cause a reasonable person to feel terrorized, frightened, intimidated, threatened, harassed, or molested and that actually causes the victim to feel terrorized, frightened, intimidated, threatened, harassed, or molested.

Defendant argues that the evidence was insufficient to establish that the complainant actually felt "terrorized, frightened, intimidated, threatened, harassed, or molested," as she indicated during cross-examination that defendant's repeated phone calls merely bothered her. But, in emphasizing an isolated remark, defendant fails to acknowledge that the complainant repeatedly testified that she felt terrorized and petrified in light of defendant's repeated phone calls. At worst, this is a situation involving inconsistent testimony, although the complainant's statement emphasized by defendant could well be viewed as merely a nonresponsive answer expressing frustration with defense counsel's question. In any event, witness credibility determinations, in light of inconsistent testimony, go to the weight, not the sufficiency, of the evidence. *People v Naugle*, 152 Mich App 227, 235-236; 393 NW2d 592 (1986). Such determinations are in the province of the jury, an area in which appellate courts may not interfere. *People v Wolfe*, 440 Mich 508, 514-515; 489 NW2d 748 (1992). As substantial evidence was produced indicating that defendant had a history of domestic violence against the complainant, suggesting the candor of the victim's testimony that she feared defendant, a rational jury could have concluded that the victim was, in fact, terrorized, frightened, intimidated, or threatened. *Gonzalez, supra* at 640-641. Defendant's argument is therefore without merit.

V. APPLICATION OF STATUTORY SENTENCING GUIDELINES

Finally, defendant argues that the circuit court improperly calculated OV-10 and OV-7, thereby rendering his sentence erroneous under the guidelines. We disagree.

A. Standard of Review

Considering first the scoring of OV-10, we review application of the statutory sentencing guidelines de novo. *People v Hegwood*, 465 Mich 432, 436; 636 NW2d 127 (2001). "A sentencing court has discretion in determining the number of points to be scored, provided that evidence of record adequately supports a particular score. 'Scoring decisions for which there is any evidence in support will be upheld.'" *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002), quoting *People v Elliott*, 215 Mich App 259, 260; 544 NW2d 748 (1996).

B. Analysis

MCL 777.40(1)(b) provides in relevant part that ten points should be scored for OV-10 if the offender exploited a domestic relationship. However, the mere existence of a domestic relationship "does not automatically equate with victim vulnerability." MCL 777.40(2).

The record is replete with evidence indicating that the complainant was a vulnerable victim due to her domestic relationship with defendant, her husband. Testimony indicated that she was repeatedly the target of domestic violence from him and that she repeatedly expressed her fear of him. Further, the complainant testified that the sexual assault occurred while she and defendant were in bed together. It is apparent that they were alone in bed together because they were in a domestic relationship. From these circumstances one could reasonably conclude that defendant exploited his domestic relationship with the complainant in order to sexually assault her. Thus, there was evidence to support the trial court's scoring of ten points for OV-10 based on defendant's exploitation of his domestic relationship with the complainant. *Hornsby, supra* at 468.

We recognize that in explaining its scoring of OV-10 the trial court stated that "on the night in question, the physical size and strength in [defendant] is bigger than [the complainant's]. I mean there's no question about it." It is true that an offender's exploitation of a difference in size or strength standing alone would only support scoring five points under OV-10, MCL 777.40(1)(c), as opposed to the ten points provided by MCL 777.40(1)(b) for exploitation of a domestic relationship. But immediately before the trial court's remarks the prosecutor referred to OV-10 as being properly scored at ten points based on the domestic relationship between defendant and the complainant. Further, "a 'trial judge is presumed to know the law.'" *People v Sexton*, 250 Mich App 211, 228; 646 NW2d 875 (2002), quoting *People v Garfield*, 166 Mich App 66, 79; 420 NW2d 124 (1988). Accordingly, it should be presumed in context that the trial court's scoring of ten points for OV-10 was based on a finding that defendant exploited his domestic relationship with the complainant and that its reference to his greater size and strength simply reflected a recognition that he simultaneously exploited that difference as well.

Turning to the scoring of OV-7, defendant has failed to properly preserve review of the scoring of that variable. During the sentencing hearing, defendant's counsel stated, "I imagine that the [c]ourt is going to score 50 points for OV-7, for sadism and torture," to which the court responded, "[a]bsolutely." "The purpose of the appellate preservation requirements is to induce litigants to do what they can in the trial court to prevent error and eliminate its prejudice, or to create a record of the error and its prejudice." *People v Mayfield*, 221 Mich App 656, 660; 562 NW2d 272 (1997). Although defendant arguably thought the court's scoring of OV-7 improper, he advanced no ground to challenge that scoring. Thus, defendant's challenge to the scoring of

OV-7 is unpreserved. An unpreserved claim of sentencing error is reviewed for plain error affecting a defendant's substantial rights. *People v Kimble*, 252 Mich App 269, 276; 651 NW2d 798 (2002).

In any event, the trial court's scoring of OV-7 was amply supported by the record. Fifty points should be scored for OV-7 if a victim was "treated with sadism, torture, or excessive brutality or conduct designed to substantially increase the fear and anxiety a victim suffered during the offense." MCL 777.37(1)(a). Sadism is defined as "conduct that subjects a victim to extreme or prolonged pain or humiliation and is inflicted to produce suffering or for the offender's gratification." MCL 777.37(3). According to the complainant's testimony, she was screaming in pain from defendant's repeated and forceful slapping of her buttocks, ramming his fingers into her vagina, and pulling at her hair. She testified that the pain from this was severe enough to cause her to vomit. This was clearly evidence that defendant treated the complainant with sadism. Thus, the trial court properly exercised its discretion in scoring OV-7 at 50 points. *Hornsby, supra*, at 468.

Affirmed.

/s/ Jane E. Markey
/s/ Bill Schuette
/s/ Stephen L. Borrello